

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	: 14-CR-00476 (ILG)
	: :
-against-	: United States Courthouse
	: Brooklyn, New York
	: :
ROBERT BANDFIELD, GREGG	: Friday, January 22, 2016
MULHOLLAND,	: 10:00 a.m.
DEFENDANTS.	: :
	: :
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TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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For the Defendant
GREGG MULHOLLAND: BY: JAMES KASOURAS, ESQ.
EDWARD V. SAPONE, ESQ.

Court Reporter: **Angela Grant, RPR, CRR**
Official Court Reporter

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1 (In open court.)

2 (Time Noted: 10:00 a.m.)

3 (Defendants present in open court.)

4 COURTROOM DEPUTY: Criminal cause for motion. The
5 United States versus Robert Bandfield and Gregg Mulholland.

6 Counsel, please state your appearances for the
7 record.

8 MS. KASULIS: Jacquelyn Kasulis, Winston Paes and
9 Michael Keilty for the government.

10 Good morning, Your Honor.

11 MR. INGOGLIA: Good morning, Judge. Gene Ingoglia
12 and Savannah Stevenson, my colleague, from Morvillo, LLP for
13 Mr. Bandfield.

14 Good morning.

15 THE COURT: Good morning.

16 MR. KASOURAS: Good morning, sir. James Kasouras,
17 Edward Sapone and Chase Ruddy for Gregory Mulholland.

18 THE COURT: Good morning.

19 We have quite a series of motions before me.
20 There are a number which are, in effect, jointly made. And
21 there are some which are made by Mr. Mulholland and some
22 which are made individually by Mr. Bandfield.

23 Why don't we address the joint requests first. I
24 don't know how you want to proceed with respect to that.

25 MR. KASOURAS: Judge, Mr. Ingoglia and I have

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1 discussed this and instead of both arguing the same motion
2 we're each going to pick one that we make jointly and then
3 we can separately address our separate motions.

4 THE COURT: All right. Now, there are quite a few
5 that were made jointly. Am I correct in understanding that
6 you're going to address those, Mr. Ingoglia?

7 MR. INGOGLIA: Yes, Judge.

8 THE COURT: All right. Fine. So why don't we
9 start with the motion to suppress the evidence that was
10 seized from the corporate offices in Belize. That's a
11 motion which both of you have made.

12 MR. KASOURAS: Yes, Judge.

13 MR. INGOGLIA: Correct, Judge.

14 And as a matter of housekeeping before I start,
15 yesterday we filed an affidavit. It was not a reply. We
16 didn't argue, but we attached a supplemental exhibit which
17 was --

18 THE COURT: That was Exhibit H.

19 MR. INGOGLIA: Correct. I just wanted to make
20 sure Your Honor had received it.

21 THE COURT: I did receive it, and I'm looking
22 forward to having it all interpreted for me.

23 MR. INGOGLIA: I think we all are.

24 The only other sort of housekeeping item is the
25 Supreme Court in Belize has apparently issued a decision in

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1 a lawsuit that was filed by Titan, which is one of the
2 entities that's at issue in the case and that was searched
3 pursuant to what we're calling the Belize searches in this
4 case. And the subject of that lawsuit by Titan against the
5 government in Belize was the legality of the search. And,
6 apparently, the Supreme Court of Belize has ruled in favor
7 of Titan.

8 We are trying to get some kind of certified copy
9 of the opinion so that we can provide it to you, but I
10 wanted you to be aware. I know the government is aware that
11 that had happened after the time that the government had
12 filed its response.

13 THE COURT: This motion that was made by Titan,
14 was that predicated upon a search warrant issued by the
15 Belize law enforcement authorities?

16 MR. INGOGLIA: It was predicated --

17 THE COURT: Let me rephrase it.

18 What was the basis of the motion to suppress?
19 Maybe that will get you.

20 MR. INGOGLIA: They were challenging, and, again,
21 I'm not familiar enough with the opinion to give you the
22 details, but they were challenging the searches that are at
23 issue in this case.

24 THE COURT: On what basis?

25 MR. INGOGLIA: On the constitutionality of them

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1 under the Belize constitution.

2 There may have been more aspects than just the
3 constitutionality, but the constitutionality was one of the
4 challenges.

5 THE COURT: Well, the reason I ask is I would
6 suspect that the legal analysis would be probably similar to
7 the analysis which underlies at least the government's
8 analysis of it, underlies the motion to suppress the Belize
9 search. Insofar as it was based upon law enforcement
10 activity by the Belize law enforcement persons or search
11 warrants issued by Belize, I understand the government's
12 position is that's not implicated or wouldn't effect the
13 validity of the admissibility of the evidence.

14 MR. INGOGLIA: I think that's right. I think
15 their position, well, is that it's irrelevant, and our
16 position is it's not dispositive, but it's relevant that a
17 Belize court has said it's illegal.

18 We'll get you that opinion as soon as I can get
19 it, a comfortable copy of it for you.

20 THE COURT: All right. I'm sorry to --

21 MR. INGOGLIA: So I'd like to quickly summarize
22 sort of the gist or the heart of our argument. This is the
23 Rule 16 challenge.

24 THE COURT: Yes.

25 MR. INGOGLIA: At its core it's a simple argument

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1 is we can't assess whether or not the searches in Belize
2 pass muster without access to documents that show how they
3 were conducted, under what authority they were conducted
4 and, importantly, what the degree of U.S. involvement and
5 control was.

6 Relatedly, and this is not an issue that we
7 flagged in our motion, but, relatedly, we can't challenge at
8 trial the admissibility and the weight of evidence that was
9 seized from these four corporate offices, but as you saw in
10 the papers, not, not itemized. So we would normally, if
11 this had been a search in the U.S., we would -- and they
12 searched four offices and lumped everything together and
13 you couldn't tell which came from IPC and which came from
14 Titan and which came from Unicorn, we would have arguments
15 about their admissibility, we would have arguments, even if
16 they were admissible, as to the weight the jury should give
17 them given that their providence is uncertain.

18 So those arguments that we would have at trial
19 that are impeded by not having access to the documents. So
20 that's the heart of our Rule 16 argument and why it's, in
21 essence, why it's material to us.

22 THE COURT: Now, before you go any further, I
23 think what makes sense to have the government address each
24 of these individual motions. So when you're finished with
25 that Rule 16 motion, we'll let the government respond to it.

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1 MR. INGOGLIA: Fair enough. That seems fair.

2 THE COURT: Okay.

3 MR. INGOGLIA: And then, look, the heart of our
4 argument here is it's inequitable, profoundly inequitable,
5 for the government to use the fruits of the search, which it
6 has received from Belize, and decline to even try to get the
7 documents underlying the search. And when I say decline to
8 try to get, what I mean is not that the U.S. Attorney's
9 Office hasn't conferred with the Office of International
10 Affairs. They apparently have discussed the issue with the
11 Office of International Affairs.

12 But jointly or based on those conferring
13 discussions, apparently the U.S. Attorney's Office has
14 decided they don't need to or don't want to ask Belize for
15 the underlying documents, and we think those two things
16 together, using the fruits, but deliberately choosing not to
17 even try to get the documents that underline the search that
18 are in Belize is profoundly inequity. That's what's
19 animating everything I'm going to talk about.

20 THE COURT: Just let me ask, these documents that
21 are underlying the search, I take it you're referring to
22 documents which authorized the search.

23 MR. INGOGLIA: I'm -- I'm talking about those --
24 those are among the documents I'm talking about. I mean, I
25 think -- so the MLAT application is what initiated the

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1 search. Presumably, a warrant was issued, that's what,
2 under Belizean law, authorized the search.

3 THE COURT: Right.

4 MR. INGOGLIA: And governed what the terms would
5 have to be.

6 Because the ultimate legal issue about whether
7 this search passes muster, whether Your Honor is going to
8 exclude it or not, apply the exclusionary rule or not, turns
9 on the degree of U.S. involvement and whether they exercise
10 control. Any documents that evidence that are part of what
11 we're seeking under the Rule 16. So it's not just simply
12 those two documents. It's not simply just the application
13 and just the warrant.

14 THE COURT: Well, before I get to the government's
15 response, if the government's argument is that the documents
16 that your request -- is not under their control, they don't
17 have possession of it, that's what they say. Or if the
18 government's argument is that the documents which have
19 authorized the search are documents which were generated by
20 the authorities in Belize, and that's foreign law, which the
21 validity of which or the extent of which or the implication
22 of which doesn't implicate the exclusionary, my question is,
23 do we need a hearing to determine or do I take it on faith
24 that the government says we don't have it? And the
25 government says that the documents are documents with which

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1 we had nothing to do, we didn't execute any warrants, they
2 weren't ours and, more importantly, I suppose those would be
3 relatively easy to resolve amongst you.

4 MR. INGOGLIA: I think that's probably right. I
5 think --

6 THE COURT: Excuse me. Excuse me. I just -- the
7 last part of that, which I think is probably as important as
8 the other two, is the government's position, as I understand
9 it, that there's no agency relationship between the
10 government and the law enforcement authorities in Belize,
11 that we were not their partners, we weren't there, we
12 weren't in the offices in Belize when the search was
13 conducted, we didn't authorize it. That was all done by
14 Belize.

15 Now, does that require a hearing or do we
16 accept -- assume that if the government issues a memorandum
17 which says that's the fact, I believe it?

18 MR. INGOGLIA: On the last point, the question of
19 whether there is an agency relationship is a fact-based
20 analysis. And the facts that would help us determine
21 whether that assertion is accurate are the documents I'm
22 trying to get in my Rule 16 application. So I think -- I
23 certainly think that just the fact that in their response
24 brief they have asserted that the record shows certain
25 things, when there's no documentary evidence of any of it,

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1 by itself isn't enough. What it would take to be enough to
2 try to establish some of those things, you know, obviously,
3 we're seeking the actual underlying documents, but there may
4 be that some aspects of those that could be done short of
5 that.

6 THE COURT: Okay.

7 MR. INGOGLIA: So -- wave at me at the end and I
8 promise I'll add. How about that.

9 So I think they're making two arguments. They're
10 making the first argument is what we're seeking is not
11 material, and I think that's the weaker of their two
12 arguments. I think the basis for a search is sort of
13 classically material to a defense. I think I previewed why
14 I think it's important. We need to evaluate whether the
15 search passes muster, whether it meets -- the standards are
16 does it shock the judicial conscience, right? And we're not
17 arguing that it does. We didn't see any facts that
18 suggests. Even on our limited access to the facts, we're
19 not aware of any fact that suggests it rises to that level.
20 It shocks the conscience of my client the way it was
21 conducted, but in terms of the case law, we're not arguing
22 that. But in terms of was there U.S. control or significant
23 involvement that is indicative of U.S. control, I think
24 that's a fair question.

25 THE COURT: Okay.

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1 MR. INGOGLIA: And that's what we're getting at.

2 And then my point about trial. I think if we were
3 going to challenge -- if they get -- if they prevail and
4 they're able to use this evidence that was taken apparently
5 without an inventory ever being conducted by the Belizeans
6 when they moved everything from the offices to some unknown
7 location for the agents to come down and sift through, when
8 they did that, apparently they didn't do an inventory and
9 it's four different offices. Not all of them are associated
10 with my client. IPC is my client's office. So if they're
11 going to use evidence that they seized sort of in
12 blunderbuss fashion and they can't document where it came
13 from, that's another reason why we think the underlying
14 documents are material. So I don't think -- I don't think
15 that's a close call, but -- and I'm happy to answer
16 questions about it, but I think the documents,
17 notwithstanding their assertions, are material.

18 They make one specific argument about the MLAT
19 application itself and there's case law that suggests that
20 because a defense can challenge the treaty itself, the MLAT
21 application doesn't have to be produced because the
22 defendant doesn't have standing to challenge the treaty.
23 But we're not seeking to challenge the treaty.

24 What we're trying to assess is the degree of U.S.
25 involvement, and a piece of that story is the MLAT

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1 application that prompted the search. And we know now for
2 the first time from the government's response that there are
3 details in that application that are factually significant.
4 The government asked that the search be done in an expedited
5 fashion and it was.

6 If I'm not dating myself too much, there's an old
7 Looney Tunes cartoon with the bulldog and his little terrier
8 friend, and the terrier would scamper around the bulldog and
9 say, "What are we doing today? What are we doing today,
10 boss?" And the bulldog would sort of slap him on the back of
11 his hand.

12 Well, that's the relationship between the U.S. and
13 Belize. The U.S. is the bulldog and Belize is the terrier.
14 And when the U.S. said can you please do this search on an
15 expedited basis -- I'm sure it was a polite request -- they
16 sort of sprinted out and they took -- they went to the
17 offices with a small, you know, an army of people and
18 gathered whoever they could and drove over in U.S. decreed
19 vehicles that there's some factual dispute about and took
20 everything out of the office, wholesale, including the
21 copiers, which only we think is significant, and just
22 relocated the contents of the office, wholesale, to some
23 other location. And then they invited the U.S. to come down
24 and take a couple weeks to go through. And to us, you know,
25 putting aside the sort of narrow point that that expedited

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1 request aspect is important and it shows why the MLAT is a
2 Rule 16 appropriate in this case.

3 THE COURT: As I understand the government's view,
4 they say that the MLAT material is confidential.

5 MR. INGOGLIA: Yeah, I think --

6 THE COURT: And with respect to the bulldog
7 terrier analysis, if my memory serves me, I think the people
8 in Belize just ignore the request that the government was
9 making to turn the material over. They said we're not going
10 to give it to you.

11 MR. INGOGLIA: But they didn't, right? Under the
12 treaty --

13 THE COURT: Well, they eventually did.

14 MR. INGOGLIA: Well, they searched it in an
15 expedited way.

16 And what the government says is we asked that
17 agents be present at the time. And Belize didn't respond.
18 But what Belize did is they took everything out of the
19 offices, moved it to a different location and said, come on
20 down and you search it. Because, remember, what the Belize
21 officials did, they didn't search, they just took. They
22 seized the entire contents of the office. You know who
23 searched, the U.S. agents. The U.S. agents came down, they
24 searched the contents of the office.

25 So all of which is to say, I've gotten ahead of

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1 myself, but the fact that in some cases the MLAT application
2 has not been deemed to be Rule 16 material, I don't think --
3 I think in this case we get a slightly different posture and
4 it matters that they asked for expedited review and U.S.
5 involvement.

6 There are -- so that's materiality. And there are
7 some documents that I think are -- have to be in the U.S.
8 government's possession that we haven't seen on the subject.
9 And I guess it's because they don't view them as material,
10 but the FBI never does anything without copiously
11 documenting it. I haven't seen any FBI documents about
12 their involvement in the search. We haven't seen any
13 documents about communications between U.S. officials and
14 Belize officials about the search.

15 So I'm not talking about documents that are in
16 Jackie Kasulis' possession, but in the U.S. government's
17 possession related to this investigation, there has to be
18 documents about the search, about communications back and
19 forth that's in their possession. They don't really
20 address this in their papers directly, but I don't know why
21 that wouldn't be. You know, the possession, custody or
22 control isn't in dispute I don't think on those issues. I
23 don't know why we don't have those.

24 With respect to -- so that's -- I can go on and
25 on, right. But let me go to the documents that are in

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1 Belize. And because that's the other question, right, does
2 the U.S. really have possession, custody or control of
3 those? And our argument is that the U.S. -- the big dog
4 does have control here; that -- and the way to test it is
5 for the government to ask, for the U.S. government to ask
6 Belize for the documents. And then we would know within,
7 you know, maybe 15 minutes whether Belize would say, oh,
8 you're offending me by trying to expand the treaty or Belize
9 would say here they are.

10 The idea that the treaty is -- has aspects that
11 envision certain documents to be confidential or that the
12 treaty was only drafted with an eye toward the government's
13 Brady disclosures and not to its larger discovery
14 obligations, I don't know whether that's true or not. I'm
15 not a student of the treaty, but it's not our problem. It's
16 their problem. They investigate the way they choose to
17 investigate. There's no MLAT exception to their Rule 16
18 obligation. I read it again. It doesn't say unless OIA
19 says they have concerns that maybe it will upset the
20 Belizeans, then you don't have to ask. There's nothing in
21 there about that.

22 So that is interesting. It's a problem for them,
23 I understand. I'm not -- it is true that the United States
24 wants to maintain relationships with countries and they
25 enter treaties for that purpose. But that doesn't dictate

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1 what Rule 16 requires. And that's what the government is
2 arguing, they're saying, well, Rule 16 must not provide for
3 this because the treaty doesn't. And that's backwards. The
4 rights that are at issue here are the rights of my client in
5 this courtroom being tried criminally by this office. And
6 that's, that's -- Rule 16 is implicated there.

7 Lots of governments -- the U.S. Attorney's Office
8 makes tactical decisions about where it goes and how it
9 collects evidence all the time, and you're stuck in the bed
10 that you make. And if you gather a bunch of evidence
11 abroad, you know, there are limitations on that and there
12 are consequences to it. And it might be that you can't use
13 it as much as you want, but their obligations are the same.
14 So I don't think it's a fair response to say either the
15 treaty is, you know, is restrictive or to say OIA, the
16 Office of International Affairs, has told us that they have
17 concerns.

18 I was a prosecutor for nine years. OIA never says
19 yes the first 12 times you ask for anything, and it's
20 because their interests are different than -- and I'm sure
21 they will agree with me about this -- than what a criminal
22 defendant's interests are, what the Court's interests are
23 and even what the prosecutor's interests are. They're not
24 interested in that. They're interested in not just
25 maintaining a relationship between the U.S. and Belize, but

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1 they're interested in maintaining their individual personal
2 relationship with whatever their counterpart is on the other
3 side, and I don't want to annoy that person, or whatever it
4 is.

5 And so frequently it is the case that the U.S.
6 Attorney's Office has to go all the way up the chain at OIA
7 asking again and again and again. I've got a prosecution
8 here. I need this for my prosecution. And that dialog
9 happens all the time. And it is not the case that, and it
10 shouldn't be the case, that an OIA functionary determines
11 the degree of production we get on these documents when
12 they're so material to our defense.

13 I think we disagree about the import of a couple
14 cases. Castroneves we think is instructive here. It's not
15 binding. It's the Southern District of Florida, but it's
16 instructive. It's persuasive I think on its face. And the
17 district court there ordered the production of the MLAT
18 application, the supporting affidavit that went with it and
19 Brazilian documents that were produced in response. And
20 that was because the Court determined that was the only way
21 the defendant could evaluate the assertion by the U.S.
22 Attorney's Office that they had tolled the statute of
23 limitations, right. And so the government's response, well,
24 this is not a statute of limitations case. You're right, it
25 isn't, but the analysis is exactly the same.

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1 The parties are in a position where the person
2 with the access to the documents is the government, and the
3 defense doesn't have an ability to test it without access to
4 the documents. And so in that case I don't know whether the
5 government made the argument that, you know, it's going to
6 offend the treaty with Brazil in some way, but the court
7 ordered what was to be produced. It didn't order, by the
8 way, how it was to be produced. It would not be our
9 suggestion that Your Honor make this very specific order
10 that they sort of throw up I think as a straw man that that
11 might cause problems with the executive powers or some such.

12 All -- look, we're asking that -- our argument is
13 the ship has already sailed. Mr. Bandfield has been here a
14 year and a half. The time for them to have decided all this
15 and made these inquiries has long past, and you should just
16 suppress this and they can proceed to trial on their other
17 overwhelming evidence which includes videotape of our client
18 and all the other things that they think is overwhelming.

19 That's our argument, right, but you could order
20 them to produce certain materials and they can figure out
21 how they get it in a way that doesn't contravene the treaty.
22 Respectfully, that's their obligation. They're the
23 government. We're the defense.

24 The fact that there may be a letters rogatory
25 opportunity, that's equally available to both sides. It's

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1 the government's obligation, let them file the letters of
2 rogatory to get the documents that they're obligated to give
3 us as part of their discovery obligation.

4 We also seem to disagree on Gomez Castrillon. And
5 I just want to point out on that, I realize I'm in the weeds
6 here, but in Gomez Castrillon the government says well --
7 they point to the Court's description of the defendant's
8 motion as a doomed motion. But the reason that it was a
9 doomed motion in that case was the defendant's in that case
10 were not U.S. citizens. But Mr. Bandfield is a U.S. citizen
11 so the analysis is completely different. But the overall
12 reasoning of Gomez Castrillon supports our argument, right.

13 I think that I have spoken too fast, but I suppose
14 the last thing I want to say is -- I'm sure that I'll take
15 that back and I'll have more to say -- but at least at the
16 moment the last thing I want to say is the government keeps
17 saying that we're relying on conjecture upon conjecture
18 about what the events were as they happened in Belize. And
19 it takes a lot of moxie, and, apparently, they have it to
20 make that argument when the reason we don't know what
21 happened in Belize is because they won't ask Belize for
22 those documents. And it's -- it just can't be. It can't be
23 and it shouldn't be that the government can use the fruits
24 of the search, which it happily accepts from Belize, but not
25 even try to get the documents in Belize that show whether or

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1 not that search was done properly.

2 It's true that some of the individual facts that
3 we offered in support of our motion by themselves are not
4 enough to reach the standard that you have to reach to
5 justify suppression. We don't have all the facts. What
6 we're trying to show to Your Honor was there's a lot to be
7 concerned about with this particular search. This is not
8 your ordinary foreign search. And the fact that you've got
9 Belizean court activity that is questioning the validity of
10 the search; the fact that you've got some facts about the
11 nature in which it was conducted, it's very unusual.
12 There's no other case I have seen where the thing we're
13 fighting about, the nature of the search we're fighting
14 about is Belize takes all, you know, the foreign country
15 takes all the documents out of one location, literally all
16 of them, moves them to another location and then invites the
17 U.S. agents down to come and do a search for two weeks.
18 That's a higher degree of U.S. involvement than in any of
19 the other cases we've talked about as it relates to the
20 search itself. And, again, that's not all the facts. They
21 have all the facts. They have some of the facts and Belize
22 has some of the facts. I don't have any of the facts, but
23 that's my point of my motion is we're entitled to them.

24 I think that's mostly what I want to say. I'm
25 sure Jackie will say something that will cause me to have a

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1 heart attack but.

2 THE COURT: Ms. Kasulis.

3 MR. KASOURAS: Judge, may I just very, very
4 briefly. There's just one thing that I wanted to add to
5 that argument in response to the motion since it is a joint
6 motion.

7 On the question of the government's assertions and
8 whether or not the Court should hold a hearing or simply say
9 it's so because they say it's so. Oftentimes, there are
10 things that perhaps prosecutors may think they know, but the
11 development of facts at a hearing may indicate otherwise.
12 One of the things that troubled us, we are trying to garner
13 facts from whatever extraneous sources we can get them from.
14 And as we indicated in our motion on page 32 and in
15 Exhibit 9, one thing that we were able to do was to obtain
16 certain proceedings and transcripts and statements made by
17 Belizean courts. And as the Court knows, there was the
18 litigation concerning the financial unit going after the
19 funds and going after the accounts.

20 To put it mildly, the court, which ultimately
21 lifted the restraints, was very concerned about the manner
22 of the searches. And the responses by the Belizean
23 authorities also buttressed our claim of significant United
24 States involvement that perhaps these prosecutors may not
25 know. For example, on page 32 we quote that the FIU -- the

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1 records -- Exhibit 9 indicates the FIU thereafter conducted
2 investigations and collaborated with unnamed foreign
3 competent authorities.

4 And later when questioned by the court which was,
5 again, very upset with the manner in which the investigation
6 had proceeded, the FIU's new director stated, and I quote,
7 no, it wasn't a bungle because it wasn't a Belize case. It
8 was a U.S. case, and the American government was very clear
9 as to their request. They were very clear in respect to
10 that end. And to the extent, that is, request, then that is
11 as far as we go, essentially is stating, and I forget what
12 the analogy was, it may have been before my time. But
13 essentially what the Belizean response, and, actually, we're
14 probably the same age, what the Belizean response was to the
15 Court's criticism, this wasn't our case. We were simply
16 doing as we were told and requested by the United States
17 government which was calling the shots.

18 And so, again, this is yet another indication of
19 very significant and rather clear United States involvement.
20 So these are facts that we've been able to glean from
21 elsewhere that do seemingly indicate something contrary to
22 the government's position.

23 I otherwise adopt my colleague's arguments.

24 THE COURT: Ms. Kasulis.

25 MS. KASULIS: Your Honor, it's clear that Your

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1 Honor understands the government's positions as set forth in
2 its papers. There are a couple of issues that I do want to
3 address. The first is the issue of the government not
4 making the request to Belize to get the search warrant
5 documents. As we noted, it's not typical in MLAT requests
6 to get those documents.

7 We have been in pretty much constant contact with
8 the Office of International Affairs who does take this case
9 very seriously and understands all of the issues and
10 concerns.

11 And as set forth in the Lee case, the Second
12 Circuit case from 2013, there was some language in that case
13 about the prosecutors having made a good-faith effort to get
14 the underlying documents. And in that case it was regarding
15 the wiretaps that had been authorized in Jamaica where the
16 defendant had been intercepted on those wiretaps. And when
17 we went ahead and looked at the underlying facts and
18 circumstances regarding the good-faith effort that the
19 prosecutors made. What had happened there was the
20 prosecutor said exactly what we did in this case, which was
21 they consulted and conferred with OIA. They had asked OIA
22 if it would be appropriate to make such a request to
23 Jamaica, and OIA said the same thing that OIA said here
24 which is it's not within the bounds of the MLAT. There is
25 the letters rogatory and we have -- OIA meaning, has

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1 significant concerns about such a request having an adverse
2 impact on its relationship with Jamaica which at the time
3 was strained.

4 There are similar facts and circumstances that
5 apply here. OIA is best suited and positioned to understand
6 the implications of making such requests on a relationship
7 with a foreign separate sovereign government. There is no
8 bulldog terrier relationship here, Your Honor. I think Your
9 Honor rightly noted that Belize clearly is an independent
10 actor. We've made requests of Belize that they have either
11 ignored, not responded to or have done what they've wanted
12 to. So the MLAT was merely an ask to execute searches
13 following Mr. Bandfield's arrest. We asked for them to be
14 expedited for obvious reasons. Bandfield's arrest was
15 public at that time. And the first we even learned that the
16 searches were being executed was through news reports.

17 So, you know, this idea that there was all of this
18 collaboration and documentation regarding our involvement in
19 the searches is simply not true because there is no such
20 documentation or collaboration that is documented therein.

21 This really does turn on whether or not there's an
22 agency relationship between the U.S. and Belize in this
23 case. And the government has set forth in its papers that
24 facts that show that there are -- there was no such agency
25 relationship, you know. I spent a lot of time, Your Honor,

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1 speaking with the agents who are involved in this case,
2 consulting with the U.S. Embassy, consulting with the Office
3 of International Affairs. The Office of International
4 Affairs has reviewed our materials for accuracy. We have
5 taken every allegation of U.S. involvement very, very
6 seriously and have tracked those allegations down to their
7 end.

8 The U.S. Embassy has consulted with every U.S. law
9 enforcement member who was in Belize at the time of the
10 search, and they have all affirmed that they were not
11 involved in the obtaining of the search warrants, nor were
12 they involved in the execution of the searches.

13 So it's the government's position, Your Honor,
14 that a hearing is not necessary. If Your Honor thinks
15 otherwise, we are happy to provide witnesses to attest to
16 what the government has set forth in its papers. But I can
17 represent that we have not taken this issue lightly; that we
18 have satisfied our requirements pursuant to Rule 16 and what
19 the law calls for. And the bottom line is that the facts of
20 this case do not come close to an agency relationship. And
21 if that's the case, the law is clear that we're in a shock
22 to the conscience category. And as the defendants have
23 conceded, we're not even close. Even taking what Andrew
24 Godfried said on its face is true, we're not even close to
25 that standard. This does not violate the norms of

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1 international decency.

2 And with respect to the government's participation
3 in the search, the government's understanding was that
4 Belizeans obtained a search warrant, that they executed that
5 search warrant pursuant to their own laws. Those -- the
6 fruits of that search was then made available to U.S. law
7 enforcement. We were not able to take copies or -- excuse
8 me -- not able to take the originals. Belizeans were very
9 clear the extent to which the government could even access
10 those materials. We were not allowed to take originals
11 outside of Belize. And so the government's position
12 ultimately is that the MLAT request is not -- is not
13 relevant and, therefore, it's not triggered by Rule 16; that
14 we don't have the search warrant materials, nor are we
15 obligated to obtain those; and that there are no Fourth
16 Amendment rights that have been violated or implicated here.
17 And that putting the Fourth Amendment aside, the shock to
18 the conscience test makes clear that this evidence is
19 admissible.

20 And, separately, with respect to the inventory
21 and, you know, how -- to what extent the Belizeans
22 documented that search, that's really issues, Your Honor,
23 for authenticity. It's not regarding whether these
24 documents are ultimately admissible and whether there's some
25 sort of violation of standards of decency or Fourth

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1 Amendment here. So for those reasons the government
2 believes that the Belize search results are admissible and
3 should be admitted by the Court.

4 THE COURT: All right. The Rule 16 issue is very
5 specifically defined by Rule 16. The government is
6 obligated to produce to the defendant documents which are in
7 the government's possession or control, documents which are
8 significant and material to the defendant in preparing a
9 defense, if they have it, if it's in their possession or
10 control. Documents which the government intends to use in
11 its case in chief should be provided to the defendant. And
12 anything that belongs to the defendant should be provided to
13 the defendant, if the government has it. Those are very
14 specific. They don't require very much in the way of
15 interpretation. The words are self-defining.

16 If the government does not have these documents in
17 their possession, then your argument, Mr. Ingoglia, is very
18 understandable. The government should make a request that
19 raises the question as to whether the government is
20 obligated to make a request, whether I can direct the
21 government to make a request. But beyond that, assume the
22 government does and the documents which you're requesting
23 that they attempt to get would be the documents which were
24 the basis for or the authorization for the search, which as
25 I understand it, as I understand your argument, as I

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1 understand what this entire discussion is about. But
2 assuming that my understanding is correct, and I'm aware of
3 the fact that the notion that judges know all the law or
4 even all the facts is very rebuttable.

5 But assuming that that is correct, then you are
6 faced with a very specific legal principle that what a
7 foreign government may have done in connection with a search
8 or in connection with whatever the activity is which may, if
9 it had been done by the United States be offensive, is not
10 offensive as far as the introduction of the material which
11 is the object of what they did, would not be excludable in a
12 United States courtroom. So you have that problem to deal
13 with. Even if they did get the documents and even if it is
14 a Belize search warrant and there's something wrong with the
15 search warrant when tested against the American requirement
16 for search warrants, it wouldn't have effected the
17 admissibility of the material which were obtained pursuant
18 to that search.

19 MR. INGOGLIA: I have a response which is if the
20 U.S. -- we've been talking about it as an agency
21 relationship between the U.S. If the U.S. exercised some
22 control, then it does matter. And --

23 THE COURT: Yes.

24 MR. INGOGLIA: And what -- we have to address that
25 question is Ms. Kasulis' -- and I take her at her word --

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1 her investigation that she conducted to conclude, which she
2 sets forth in her brief, that there is no agency
3 relationship. And, respectfully, that's never been the
4 standard.

5 THE COURT: So we'll have a hearing. We'll need a
6 hearing if that's what it is that would be required.

7 And the other question, of course, is an
8 interesting one. What is the role of a United States
9 federal court in making, if there is any at all,
10 determinations regarding diplomatic determinations made by
11 the government as to whether some conduct which is being
12 requested or acquiescing in a request offends diplomatic
13 protocol which we're not prepared to get involved with.

14 Is it the function of a court to say, well, you
15 know, we're not interested in the diplomacy of the matter.
16 We're not interested in diplomatic protocol. We're
17 interested in due process, fairness and all the standards of
18 the federal court. It's an interesting issue but --

19 MR. INGOGLIA: Well, I think there's another
20 alternative which is --

21 THE COURT: What is rogatory?

22 MR. INGOGLIA: Well, for sure.

23 And I see the U.S. Attorney's Office eagerly
24 preparing letters rogatory. But I think you answered the
25 question the way I would answer it, although I don't know if

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1 you agreed. You're asking it rhetorically.

2 I think that the answer is the Court's role is to
3 make sure that what happens to Mr. Bandfield in this court
4 before you meets with -- satisfies due process and
5 constitutional requirements. That doesn't mean that issues
6 of diplomatic relationships aren't important. And it might
7 be that the U.S. Attorney's Office decides, bowing to those
8 diplomatic concerns, that it won't seek to offer into
9 evidence things that -- for it to use it would have to risk
10 concerning, you know, violating a concern that's been
11 articulated by the Office of International Affairs. That's
12 another direction it could go, and I'm not sure that the
13 burden -- we should reinterpret Rule 16 in a way that lets
14 them use the evidence out of diplomatic sensitivities.

15 THE COURT: All right. Just let me conclude this
16 part of the argument by this observation. I devoutly hope
17 to believe that the government is purer than Caesar's wife.

18 I'm offended, really offended whenever I read or
19 hear about government misconduct or government which does
20 something which is impure. The object of what goes on in
21 this courtroom or in any American courtroom is to be fair
22 and to see that the trial which is conducted and the rights
23 of the defendant are fully protected, and that the
24 government should do what the government should do in the
25 interest of fairness and justice.

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1 It may be the government is not legally obligated
2 to do certain things, but if the government can do it
3 without violating some law or other protocol, the government
4 should, if that would be the fair thing to do.

5 Rule 16 is very specific. It tells the government
6 what it is the defendant is entitled to by way of discovery.
7 And I would hope that the government complies with the
8 spirit of Rule 16, which is to give the defendant the
9 material they need to prepare an effective defense and to
10 see that the trial, which they will be a party to, the
11 prosecution of which they're the object, is completely fair,
12 satisfy all notions of decency and fairness. That's what I
13 devoutly hope the government will do.

14 And the same is true for the defendant. The
15 government makes reciprocal requests of the defendant to
16 turn over material which the defendant has. More often than
17 not, that request is ignored. At least that's been my
18 experience over the years, so it works both ways. The
19 object here is to have a fair, fair trial which satisfies
20 any conception of decency and a civilized concern.

21 Having said that, lets move on to Joint Request
22 Number 2 which -- now, we'll deal with whether a hearing
23 should be scheduled with respect to the agency issue when
24 we're finished, but if I for some reason overlook it, please
25 remind me that that's what we should be doing.

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1 The Joint Request Number 2 is to suppress
2 discovery produced after the discovery deadline. I really
3 don't quite understand that request or whether it really has
4 any merit. I mean, Rule 16 or my experience here over a
5 number of years is that the government is obligated to
6 produce whatever discovery material they should be producing
7 regardless of whether there is or isn't a deadline. If
8 material becomes available to the government after the
9 deadline, the government -- it's a role in -- particularly
10 in a case like this where the amount of discovery is just
11 voluminous. It hasn't all descended into the hands of the
12 government on one fell swoop.

13 So what is the -- what is the --

14 MR. INGOGLIA: So we don't disagree about what you
15 just said. And, in fact, we're not seeking to exclude newly
16 discovered evidence. So I don't -- they didn't give me
17 dates of when they found whatever they found, but if they
18 came into possession of some document that, you know,
19 because they had signed up a cooperator and that cooperator
20 gave them new documents they didn't have before, of course
21 they couldn't have produced it. They don't have a time
22 machine. They couldn't have produced it before. That's not
23 what we're saying.

24 I'll give you the two, what we think are the most
25 egregious examples. At the time of Mr. Bandfield's arrest

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1 in September of 2014, roughly a year and a half ago, he had
2 with him a laptop and a flash drive. And his wife was
3 traveling with him and she had a laptop. Those documents --
4 those items were seized, and they were not -- and, look, I
5 think what happened is they got put in a drawer and then
6 people forgot about them. I don't think that that's an
7 issue, but more than a year passes, they're not produced in
8 discovery. They're -- right before the deadline, Your Honor
9 set a deadline at a conference that we had in April for
10 May 18th, and three days before that they decided to get a
11 search warrant to search the contents. So up until that
12 point they had them. There's personal stuff on there,
13 photographs of their children, emails, communications with
14 their family. Those were seized, but not searched.

15 And then they go get a search warrant and then
16 even then there's nothing produced to the defendant. And I
17 think most egregiously in the case of Mr. Bandfield's wife,
18 that laptop -- there's no argument that her laptop was
19 seized incident to arrest or anything. They just take it.
20 They take it, they don't search it, they hold on to it. She
21 calls and says what's going on with my laptop. They say do
22 you consent to a search? She says no. They say, well, it's
23 going to be a while. And they don't get a search warrant
24 then and they wait a very long time to get -- to bother to
25 get a search warrant. And even then they don't return it

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1 until we file our motions. And then, according to a
2 footnote in the brief, the government realizes that
3 Mr. Bandfield's wife would like her property back.

4 And, respectfully, that's, that's crazy. Of
5 course, she's not gifting it to the United States. Of
6 course she wants her property back. And that's an unlawful
7 seizure.

8 And, yes, the defense says we're not extremely
9 prejudiced because, you know, we get that electronic
10 evidence late because we don't have a trial date yet. Look,
11 I don't know yet because I haven't studied what's on her
12 laptop, and whether we're prejudiced or not. But this is
13 the flip side of the coin to the argument about when one
14 should consider employing the exclusionary rule. It's when
15 there's conduct, not necessarily of malintent, but of
16 malconsequence where -- that you want to deter.

17 And it's not okay to seize a U.S. citizen's
18 laptop, not search it, not do anything with it, not return
19 it for more than a year. It's just simply not okay.
20 There's no justifiable basis for it. They don't attempt to
21 excuse it. I don't think it was -- I don't know what
22 happened, but I don't think anyone disagrees about broadly
23 what the facts are. And so this is, I think, an easy one
24 that should be suppressed. There's just no basis for doing
25 what they did. They mishandled it. They shouldn't have

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1 done it. What they should have said was, our bad, we're not
2 going to use the evidence. So that's the argument on the
3 laptop and the flash drives. Those, I think, are the most
4 egregious examples.

5 There's some other discovery that comes after the
6 deadline that the government had before the deadline, and
7 that's the category of stuff we're objecting to. I'm not
8 objecting to stuff they found later. That's our argument.

9 THE COURT: Well, let me understand your argument,
10 Mr. Ingoglia. First, I thought I heard you say that the
11 seizure was completely illegal to begin with.

12 Is that what you said?

13 MR. INGOGLIA: The seizure of -- I don't know what
14 the basis was for the seizure of Mr. Bandfield's wife's
15 laptop.

16 THE COURT: I thought I heard you say that the --
17 having possession of it was completely unlawful to begin
18 with which suggested that the seizure was unlawful. I
19 assume that it's a seizure incident to arrest. I would
20 just -- if I asked what was the basis for the seizure,
21 that's the answer I would get otherwise I can't imagine why
22 else the laptop was seized, why it was held for as long as
23 it was.

24 MR. INGOGLIA: Well, she wasn't arrested, but
25 Mr. Bandfield was, yes.

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1 THE COURT: I'm sorry.

2 MR. INGOGLIA: Go ahead. Please, I apologize.

3 THE COURT: Assuming that's not the basis for your
4 suppression, the only other basis for suppressing would be
5 if there's extreme prejudice. Or, third, just simply punish
6 the government and say what they did was bad and we're going
7 to punish you for being bad, and we're going to suppress it.

8 MR. INGOGLIA: I think that -- I mean, to be fair,
9 I don't really disagree with your analysis.

10 THE COURT: Which is what you're asking me to do.

11 MR. INGOGLIA: Exactly right. I think that's
12 right. Look, I think --

13 THE COURT: What they did was terrible, therefore,
14 we should suppress it. All right.

15 Ms. Kasulis.

16 MS. KASULIS: I think Your Honor summed up the
17 defendant's arguments well. There was a delay. I think
18 we've conceded that in our papers, but we do not believe the
19 delay was unreasonable considering -- unreasonable
20 considering the voluminous amount of evidence in this case,
21 Your Honor.

22 As you're aware, the government had been
23 processing all of the Belize computer evidence that had been
24 seized starting in October of 2014. We did obtain the
25 search warrant in May. We then were able to provide a copy

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1 to the defendant. I believe it was -- we obtained a hard
2 drive and then provided it in November. But there are no
3 allegations, Your Honor, that the agent acted in bad faith
4 or that really there was any prejudice here whatsoever,
5 especially considering that the computer is Mr. Bandfield's
6 own computer.

7 If there's any evidence for which he should know
8 what's on the computer, it's his own computer. So we
9 concede, Your Honor, there was a delay. There's a lot going
10 on in this case and a lot of moving parts, but we do not
11 believe that suppression is warranted here considering the
12 facts and circumstances.

13 THE COURT: Is there anything in that -- in those
14 laptops that the government intends to use in it's case in
15 chief that's Rule 16 material that hasn't yet been turned
16 over?

17 MS. KASULIS: It's been turned over, Your Honor.
18 And we actually even turned over the subset of the evidence.
19 So we imaged the laptop and turned it over to Mr. Bandfield
20 right away. We then actually or the agent, of course, went
21 through the laptop and culled the information that would be
22 responsive to the search warrant. We then produced that
23 culled set to Mr. Bandfield so he knew what we had deemed
24 relevant pursuant to the search warrant or within the bounds
25 of the search warrant. And produced only that culled set to

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1 Mr. Mulholland to, of course, address concerns about
2 personal information, et cetera.

3 Then the rest of the computer, Your Honor, is
4 locked by FBI CART. Our agents can't access it. It's only
5 then the relevant -- evidence deemed relevant from the
6 computer that the agents can now have access to.

7 We did produce it in Rule 16 discovery. It's
8 unclear at this point whether or not we're going to rely on
9 any of that evidence at trial. We're still really reviewing
10 it and considering it with respect to the rest of our
11 evidence, but we believe we complied with Rule 16 and the
12 evidence shouldn't be suppressed.

13 THE COURT: Well, has -- is the question whether
14 the computer should be returned? Just the thing, the
15 computer?

16 MR. INGOGLIA: Well, that was a question.

17 THE COURT: Has that been returned?

18 MR. INGOGLIA: Apparently, last week they returned
19 Mr. Bandfield's wife's computer to her.

20 THE COURT: Okay. All right. All right. Lets
21 move on. I'll undoubtedly deny that motion, Mr. Ingoglia.

22 MR. INGOGLIA: You're less outraged than I am,
23 Judge.

24 THE COURT: I'm sorry.

25 Now, with, with a footnote of reprimand to the

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1 government for being dilatory, to put it mildly.

2 The next third joint request is the bill of
3 particulars. The bill of particulars -- is it necessary for
4 material? I don't have to review it. I think I've written
5 bill of particulars motions at least a dozen or more times,
6 and they're almost always denied, but why should this one be
7 granted? There's no double jeopardy problem I don't
8 believe.

9 MR. INGOGLIA: No. Look, they gave us some
10 information in their response --

11 THE COURT: And the indictment tells you exactly
12 what it is you're charged with. I mean, those are the basis
13 upon which a bill of particulars would be granted.

14 MR. INGOGLIA: So let me give you the couple of
15 items that I think are out of the ordinary and you'll rule
16 on it.

17 One of our requests was the time period after
18 which one of the cooperators began cooperating. And what we
19 didn't articulate in our papers was the reason for this
20 request. And the reason is that while Mr. Bandfield was in
21 prison and represented by us, a person who is now a
22 government cooperator, I believe, tried to contact him and
23 tried to visit him in jail, and, in fact, called our office
24 to seek our assistance in arranging for a visit.

25 So we asked the U.S. Attorney's Office, was he a

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1 cooperator then or not, because if he was a cooperator, he
2 should -- and he's acting as an agent of the U.S. Attorney's
3 Office, he can't be contacting the defendant. That would be
4 a violation of his Sixth Amendment rights. So we just asked
5 that question, and they said we decline to tell you, and so
6 that's why it's in our bill of particulars.

7 THE COURT: That's the only item that you're
8 requesting in the bill of particulars?

9 MR. INGOGLIA: The other item is we asked for the
10 time period, the universe of co-conspirators by time period.
11 They've charged roughly a five-year conspiracies and the
12 bulk of the evidence is in 2014. I'm on significant notice
13 about who the participants are in 2014. That's when the
14 undercover was involved. So there's wires. There's a lot
15 of documentary evidence about communications between people.

16 In 2009 I got bank records and so I can't tell if
17 their theory is this same core group that was involved in
18 2014 was also involved in 2009 or there's some other cast of
19 characters that was involved in 2009 and that's why we made
20 that request.

21 MR. PAES: Your Honor, if I may address the bill
22 of particulars issue.

23 One I think as Your Honor pointed out, the two
24 requests that they've made now, I don't think are the basis
25 for a bill of particulars. Trying to find out when a

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1 cooperating witness started cooperating with the government,
2 I don't see what that has got to do anything with respect to
3 requesting a bill of particulars.

4 Again, similarly, with respect to when certain
5 co-conspirators were part of the conspiracy and when they
6 were not, again, I don't think that is part of the bill of
7 particulars request again. With respect to what the charges
8 are in terms of, you know, their facing, which is really
9 what a bill of particulars is meant to do, which is to
10 inform them about those charges, I think it was pretty
11 clear.

12 And especially when it comes to Mr. Bandfield, as
13 we stated in our papers. This isn't a situation where we
14 have a defendant who's a minor player in a conspiracy who
15 joins for a portion of the conspiracy, and, hence, is
16 concerned about, well, I want to just be sure. You know,
17 I've been charged with this five-year conspiracy period and
18 I want to get a sense of who are they alleging I was
19 involved with during the period that I was involved in the
20 conspiracy.

21 Yeah, Mr. Bandfield, according to the government's
22 theory, is the head of the conspiracy who was involved
23 during the entire time period. Yes, over that time period
24 there were certain individuals who joined in and left the
25 conspiracy, but that is not, again, information that

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1 necessitates a bill of particulars in this case. And so he
2 has no concern as to what his conduct was or as to what the
3 allegations are with respect to the charges brought against
4 him. And, hence, like finding out what exactly the time
5 periods of the various co-conspirators when they came and
6 left, if anybody knows that information better than even the
7 government, it's Mr. Bandfield because he was the one who
8 was operating the entire operation in Belize.

9 THE COURT: All right. With respect to that,
10 Mr. Ingoglia, I think the rules regarding bills of
11 particular are so clear. What you're charged with I think
12 is nothing that you have any doubt about. The indictment is
13 very clear insofar as the charges are concerned. You don't
14 need a bill of particulars to tell you what it is you're
15 charged with, which is essentially the purpose of it. The
16 purpose of it is also to restrict the government with
17 respect to evidence at some later time and, of course,
18 you're not really not asking for that knowing your very
19 professional conduct of -- your representation of your
20 client and effective representation of it.

21 And, certainly, there's no double, double jeopardy
22 issue. It seems to me what I'm hearing all the bill of
23 particulars material you want is really evidentiary stuff
24 which really you're not entitled to. So that's denied.

25 The next joint request is to strike surplusage

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1 from the indictment. I think I've written about that on a
2 number of occasions in the past, probably in Gotti and a
3 couple of others where they sought to strike snitches and
4 rats and all of that stuff in organized crime indictments.

5 Now, you want to strike what, nominees?

6 MR. INGOGLIA: Look, I think the particular quote
7 that most aroused my ire was that certain words had a
8 meaning in the quote "securities fraud context." I can't
9 imagine that there will be admissible testimony at trial
10 concerning definitions of terms in the securities fraud
11 context. Not -- we're not talking about the securities
12 context, you know, because I'm sure there will be plenty of
13 testimony about that, what do these words mean. To educate
14 the jury a little bit, I think that's fine. But the
15 securities fraud context, to me, it's inherently pejorative.
16 It's speculative and I don't think there's going to be
17 evidence to back it up and, yet, it's going to be in the
18 charging instrument as written. And so I think that's the
19 most striking example of what we sought to strike.

20 THE COURT: Well, I just don't have a specific
21 language that you have in mind, but I've got the superseding
22 indictment. If you know --

23 MR. INGOGLIA: I can point you --

24 THE COURT: It will probably be in the papers.

25 MR. PAES: Paragraph 17, Your Honor, I believe it

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1 is.

2 THE COURT: Of the superseding indictment.

3 Paragraph 17?

4 MR. PAES: Yes.

5 THE COURT: The term "nominee," is that the
6 paragraph?

7 MR. PAES: I believe that's --

8 THE COURT: Is that the paragraph you're concerned
9 about, Mr. Ingoglia?

10 MR. INGOGLIA: I don't have it in front of me.

11 Do you mind if I look over your shoulder?

12 MR. PAES: I would just --

13 THE COURT: The nominee in the securities fraud
14 context refers to a person or firm.

15 MR. INGOGLIA: Yes, that's it. In the securities
16 fraud context, yes.

17 THE COURT: What it is that you're --

18 MR. INGOGLIA: My objection is to --

19 THE COURT: What is it that raises your ire?

20 MR. INGOGLIA: -- the securities fraud context as
21 if there is a securities fraud context for the term
22 "nominee." There is a term "nominee" that's frequently
23 used in the securities context.

24 I mean, look, I've never heard of such a thing,
25 you know, the securities fraud context. I don't think it

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1 would be admissible testimony.

2 THE COURT: So what you're asking is that this
3 ought to read the term "nominee" refers to a person or firm
4 in whose name. You just want to delete "in the securities
5 fraud context," just that phrase, is that it?

6 MR. INGOGLIA: That would be acceptable to us, you
7 know. The term "nominee" as used in this indictment.

8 THE COURT: Okay. Any problem with that?

9 MR. PAES: Your Honor, one of the things we did
10 mention also in our response that we'll be superseding to
11 fix a couple of things which actually were helpful and
12 brought to the attention to us by the defense motions. We
13 can try and clarify. The reason if you just take out -- if
14 you modify a word right now, it would change the meaning
15 because the government, you know, the word "nominee" is in
16 terms of standard English language clearly means something.

17 THE COURT: Mr. Paes, this whole indictment is a
18 securities fraud indictment, isn't it? So what are you
19 adding?

20 If it's upsetting Mr. Ingoglia, I can take it out.
21 Now, what's next.

22 MR. INGOGLIA: I was hoping that was going to be
23 the standard on the Rule 16.

24 MR. PAES: We'll fix that in the superseding to
25 make it a little bit more acceptable to Mr. Ingoglia.

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1 THE COURT: Okay. Now, with respect to -- I think
2 I've taken care of that motion, that joint request.

3 MR. KASOURAS: Judge, we've made a separate motion
4 on surplusage and it is --

5 THE COURT: Well, I'll get to that. I'll get to
6 your motions.

7 With respect to Joint Request Number 5, I think
8 that's the next one.

9 MR. PAES: 7.

10 THE COURT: It requires the government to produce
11 Brady materials immediately and Giglio material 120 days in
12 advance of trial and Jencks material.

13 As far as Jencks material is concerned, you know,
14 I have no authority to direct the government. The statute
15 tells the government when it is they have to turn over that
16 material.

17 But I think it's been the government of this
18 office, in any event, to turn Jencks material over pretty
19 much in advance, even though they're not required to.

20 As far as Brady and Giglio material is
21 concerned --

22 MR. INGOGLIA: Judge, I think that their response
23 addressed one aspect of our Brady requests, so I think we
24 don't have a remaining dispute on that. I think we'd like
25 more time on the Jencks material and 3500 material than

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1 they're offering, but I recognize that unless you feel like
2 you wish to exert some persuasive power.

3 THE COURT: All right. Again, this is -- I don't
4 want to make that speech again about fairness and so on and
5 so forth. There's no reason in the world why it can't be
6 turned over earlier. You're not putting a witness in
7 jeopardy or worried about things that would be unlawful or
8 prejudicial for somebody I don't see any reason why it's
9 held until.

10 I wrote an opinion on that. I directed, because
11 if you read Brady and you read Giglio in the Supreme Court
12 it says upon request. And I wrote a rather long opinion in
13 which I said the Supreme Court said turn it over upon
14 request. And the Second Circuit didn't think upon request
15 means upon request. So, again, the government, do what is
16 the decent, nice thing to do.

17 All right. That takes care of that.

18 All right. Now we have Bandfield's individual
19 requests. Request Number 1, severance from Mulholland.

20 MR. INGOGLIA: So the request is principally
21 animated by speedy trial concerns. As you know,
22 Mr. Bandfield has been incarcerated since September of 2014
23 and we're ready to go as soon as Your Honor can have us.
24 You know, starting April 1st, if that would work. I
25 recognize that Mr. Mulholland joined the party late. He was

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1 arrested, you know, a year in and hasn't had the benefit of
2 the same amount of time. So that's what's animating the
3 request.

4 In terms of the evidence against the two
5 gentlemen, as I understand it, they're, you know, two
6 circles that overlap in the middle, but there's a big piece
7 of trading activity evidence that you wouldn't necessarily
8 need to introduce against Mr. Bandfield. And there's
9 probably a bunch of undercover testimony you wouldn't need
10 to introduce against Mr. Mulholland. There is an overlap,
11 but I don't think it is, given Mr. Bandfield's speedy trial
12 concerns I think -- what I want to make sure we achieve is
13 that he goes forward as fast as possible.

14 THE COURT: Do you want me to respond to that?

15 MR. PAES: No, Your Honor, I'm happy to.

16 THE COURT: Well, I will.

17 MR. PAES: With respect to any prejudice, I think
18 our papers make it clear there's absolutely no prejudice to
19 Mr. Bandfield in terms of, you know, what he describes as
20 the evidence that would be admissible against
21 Mr. Mulholland. In fact, the evidence admissible against
22 Mr. Mulholland, the trading activity that he describes, is
23 going to be admissible against Mr. Bandfield regardless
24 because we have charged him with the securities fraud
25 counts that we've talked about. We have charged him with

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1 securities fraud conspiracy, because he provided the
2 platform by which the scheme was executed. So all of that
3 evidence is coming in anyway.

4 And I think we made it very clear with respect to
5 the kind of arguments about how Mr. Mulholland is somehow a
6 much more -- I don't want to mischaracterize it, but at
7 least a bigger player for some reason because he made a
8 whole lot of more money than Mr. Bandfield. We talked about
9 it in terms of role. We look at Mr. Bandfield as being kind
10 of the mastermind of the entire Belize operation, and
11 Mr. Mulholland is a leader in terms of the top client that
12 Mr. Bandfield had. So they're equally bad role players in
13 the government's eyes. And so none of this prejudice is
14 substantial that under case law constitute a miscarriage of
15 justice.

16 So I think severance is -- if there were ever a
17 case where severance should not be granted, I think it's
18 this. They are so intertwined and interlinked in this case.

19 And with respect to speedy trial concerns, I
20 haven't heard, you know, Mr. Kasouras say anything about it
21 as to when, you know, he would be ready. I think the only
22 thing we had -- Mr. Kasouras asked for so far was a one-week
23 extension to file his motions. That's the only delay I
24 think that has been called so far by Mr. Mulholland being
25 added to the indictment. So I don't think that qualifies as

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1 some kind of miscarriage of justice either in terms of a
2 delay of speedy trial.

3 Whether we have a trial on April 1st as
4 Mr. Ingoglia wants, or if we have it on May 1st to give it
5 some time for Mr. Kasouras. And we also don't know what
6 lawyers' schedules are right now or the Court's schedule for
7 that matter. But the government is ready to go to trial
8 whenever the Court deems.

9 THE COURT: How long does the government
10 contemplate this trial will take?

11 MS. KASULIS: Approximately a month, Your Honor.
12 Four weeks.

13 THE COURT: With respect to the motion to sever, I
14 really can't add anything, anything at all to what the
15 Supreme Court said in Zafiro which is essentially the
16 deciding case in all severance motions.

17 The parties are properly joined. If you look at
18 Rule 8, properly joined as far as Rule 14 is concerned. So
19 that severance on that basis really has no merit from a
20 legal point.

21 And insofar as the Speedy Trial Act is concerned,
22 I'm sure that Mr. Mulholland is much anxious to have a
23 speedy trial as Mr. Bandfield is. And I think that judging
24 by the motion that was made on behalf of Mr. Mulholland, I
25 will suspect that Mr. Mulholland knows just about everything

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1 about this case in order to go to trial and prepare an
2 effective defense as Mr. Bandfield knows.

3 With respect to from a legal point of view, I
4 think it's 3161 of Title 18, as far as speedy trial is
5 concerned, I think specifically says that if the speedy
6 trial clock is stopped as to one defendant, it stops as to
7 all. That happens frequently where you have
8 multiple-defendant cases. So I don't know if that speedy
9 trial argument is effective.

10 So I made some observations, Mr. Kasouras, about
11 your readiness to go to trial, and I would expect that
12 you're going to be ready to go to trial expediently. I
13 don't think that there should be very much need for a delay
14 as far as your preparation for trial is concerned. You've
15 had an enormous amount of material provided already.

16 MR. KASOURAS: That's true, Your Honor. My issue
17 is -- well, I have a couple of issues. But my schedule will
18 not permit a trial for -- and I'm not talking about a long
19 time, but I'm starting a trial that is definitely going in
20 this courthouse on February 22nd. And then I have a trial
21 that has been scheduled in March.

22 I spoke to Mr. Ingoglia about this, and reasonably
23 speaking, Judge, there's a lot of material that we have been
24 provided, but there's also a mountain of material that we
25 need to continue with in order to prepare for trial.

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1 With respect to Mr. Mulholland, the documentary
2 evidence and the complexity of the case with respect to him
3 is far greater given the fact that he is accused of pretty
4 much masterminding the trading of stock for over 40
5 companies as well as a manipulation of it. So I'm just
6 saying this is not a case for which a tremendous amount of
7 preparation is not in order. And I am going to be tied up
8 for the next three months on trials that are older, that
9 have been set and that are also somewhat complicated.

10 So, reasonably speaking, I spoke to Mr. Ingoglia,
11 the very earliest I can be prepared is June 1st.

12 THE COURT: Well, we'll deal with that at a later
13 time, and I'll have a conference with all parties with
14 respect to that, and we'll fix the earliest conceivable date
15 that we can fix to get this case moving.

16 MR. PAES: Can I just add one thing to what
17 Mr. Kasouras said. With respect to the 40 pump and dumps
18 that he referenced and the complexity of it. We have no
19 doubt about, obviously, the complexity of the case. But I
20 think as the government represented in its motions, you
21 know, we will be providing by the end of this month a list
22 of ten tickers or less that the government is going to be
23 relying on at trial.

24 Two of those tickers we've already identified as
25 being the two substantive counts, which is CYNK and VLNX.

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1 And those two tickers are the main substantive counts that
2 they were aware of when the indictment was returned. So --
3 and we will further reduce the additional tickers that we
4 would include as part of the conspiracy count to, you know,
5 eight or less than that. So it's going to be a much more
6 narrow case than, you know, I think Mr. Mulholland is
7 concerned about at this time.

8 THE COURT: All right. As I've indicated, I
9 intend to have another conference before long to see if we
10 can't fix the speediest trial date or that would accommodate
11 all the issues that may be involved.

12 Now, I understand there's another superseding
13 indictment.

14 MR. PAES: Yes, Your Honor.

15 THE COURT: Now, is that going to be superseding
16 anything that's substantive that would prevent?

17 MR. PAES: The only substantive change to it would
18 be the addition of Mr. Mulholland to the tax fraud
19 conspiracy count which Mr. Mulholland actually already
20 addressed and tried to counter in his papers. So we're
21 going to fix that.

22 The only other change, again, changes which are
23 not significant or not substantive, is the change in the
24 date range for one of the charges as I believe Mr. Ingoglia
25 pointed out. There was some inconsistency between the

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1 conspiracy range and the money laundering range. And since
2 they're tied, we will fix that.

3 And the third thing, again, which was pointed out,
4 was the definition of corrupt clients in the indictment
5 which indicated them to be U.S. clients only. And we will
6 kind of fix that to include both U.S. and non-U.S. clients.
7 So other than the addition of Mr. Mulholland to the tax
8 fraud conspiracy, most of the other changes are, you know,
9 more ministerial.

10 THE COURT: When do you contemplate having --

11 MR. PAES: We've actually scheduled -- I'm sorry,
12 Jackie, do you want to address that?

13 THE COURT: I'm sorry?

14 MS. KASULIS: We requested grand jury time, Your
15 Honor, I believe it was February 12th. So in the very near
16 future.

17 THE COURT: Okay. All right. Now, the next
18 motions are Mr. Mulholland's individual motions. And
19 Mr. Mulholland seeks to suppress wiretap evidence from March
20 and April.

21 Mr. Kasouras, do you want to address that?

22 MR. KASOURAS: Yes. Thank you very much, Judge.

23 Judge, initially when I first came aboard and I
24 heard about a wiretap and I heard about Belize and I heard
25 about extraterritorial involvement by defendants, I didn't

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1 expect to have much of a wiretap motion. But in reading all
2 of the materials that we have been provided with, it has
3 struck me that even in a case involving other countries,
4 that the government in this case has supplanted the
5 requirement of necessity with a different standard that I
6 would refer to as wouldn't it be nice. And wouldn't it add
7 to our case.

8 With respect to necessity, Judge, it is seldom
9 that I am able to discern such easy and complete
10 infiltration by the United States government into an
11 organization, albeit one that's out of the country.

12 In this case, from the very beginning I have
13 really not in quite some time seen anything easier.
14 Starting in November of 2012 there's an initial contact with
15 a Kevin Leach with an undercover and what follows is
16 basically an invitation into this organization.

17 THE COURT: Excuse me. Would you just help me by
18 identifying what it is that you find egregious or warrants
19 suppressing the wiretap evidence. Is there something about
20 the wiretap application? Is there something deficient about
21 what it is that the agent said was the necessity for the
22 wiretap? Was there a question of whether he exhausted
23 ordinary, normal investigative techniques or normal
24 procedures? What is it that you're complaining about?

25 MR. KASOURAS: It's all of it. The necessity

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1 requirement, in our view, is not satisfied.

2 Judge, you had undercover infiltration into this
3 organization, contact with several people, meetings in
4 Belize during which the government describes statements by
5 Mr. Bandfield and other people basically explaining what the
6 government believes is this scheme from the beginning to
7 end. You have a confidential informant. There's
8 surveillance, videotape, audio tape. There are subpoenas
9 that were executed. There are interviews that were
10 conducted. There were toll records that were obtained.
11 There were telephone toll analyses, email search warrants
12 and financial investigations, that basically, according to
13 this affidavit.

14 Now, we do make a Franks' motion later, and I'll
15 explain that, but the necessity requirement here is not
16 satisfied. There was no necessity for a wiretap. They had
17 the financial institutions. They had 23 email addresses
18 which yielded tremendous results. They identify all of the
19 people if -- well, most, if not all, of the people in those
20 accounts. They had Pay Pal records which clearly
21 demonstrated how the money was moved into the accounts in
22 Belize, out of the accounts in Belize, from whom they were
23 moved, who owned the accounts.

24 And then, again, you had meetings in Belize,
25 invitations to come back, invitations to dinner to basically

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1 meet the people the government deems to be the
2 co-conspirators. They had the names of the accounts, they
3 had all of the transactions. And then combined with that,
4 they had admissions on video and audio of the transactions.

5 And the undercover actually became a client, went
6 to them and said, I'd like to open an account, I'd like to
7 not pay taxes, I'd like to avoid American regulatory
8 authority. And was then, in detail, in detail explained,
9 okay, this is how we do it, this is the way we're going to
10 do it and then they did it. They had the names of financial
11 institutions.

12 So in terms of necessity, this wiretap was nothing
13 more than to supplement a case. When the affidavit -- when
14 the affiant in the affidavit explains that surveillance
15 wouldn't have worked. Well, Your Honor, surveillance
16 wouldn't have worked if the company was located across the
17 street from the courthouse. You can't just sit on a
18 financial office and see what happens. The point is, every
19 single investigative technique that we know of was utilized
20 with, with great success.

21 And I guess the way I would put it to you is if
22 you take the wiretap and the evidence gleaned from the
23 wiretap out of this case, you wouldn't have the same
24 indictment. You would have the same evidence except for
25 these additional and what we would submit are, in this case,

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1 gratuitous conversations that were simply not necessary.

2 Now, with respect to the affidavit and the
3 standard for misstatements and omissions, what I'll say is
4 this: The affidavit simply does not describe the resounding
5 success that all of these investigative techniques that were
6 utilized demonstrate. And so one is left to wonder if the
7 issuing magistrate had a recitation of this investigation
8 and all of the results from it, then a question becomes
9 whether the issuing magistrate would have determined that
10 necessity was demonstrated.

11 With respect to one specific item that we do alert
12 the Court to, is there's an inconsistency in an affidavit
13 that was submitted in support of a search warrant, I
14 believe, for something belonging to Mr. Bandfield in which
15 the agent very specifically states just how successful the
16 email investigation was in identifying the IPC clients. And
17 then in the affidavit in support of the wiretap, that's
18 downplayed and it's stated that the email, the emails that
19 were, were a product of the search warrant were not
20 successful in identifying the IPC clients.

21 The fact of the matter is, Your Honor, the
22 investigative techniques, the old stuff, the traditional
23 stuff that they've been using, you know, for decades and
24 decades, worked in this case really without a glitch. You
25 had no counter surveillance. You had no countermeasures

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1 taken by any of the individuals. These people were,
2 according to this affiant, ready and willing to talk and to
3 conduct business in very, very specific means. Wiretaps
4 reveal the words spoken by particular individuals. And I
5 understand that that's important when it's necessary.

6 Your Honor, all of the individuals here were
7 recorded in Belize and videotaped. There are consensuals.
8 They have conversations. So that is the crux of our motion,
9 that necessity was not established and that the affidavit
10 did not adequately apprise the issuing magistrate of the
11 success of investigative techniques. And at least, in one
12 instance, misrepresented the success of the emails that were
13 procured through search warrants.

14 MS. KASULIS: Your Honor, the idea that the
15 wiretaps could not provide any sort of additional evidence
16 in this case is just simply not true. Certain kinds of
17 evidence, obviously, yield different kinds of results.

18 In this case Mr. Bandfield had a very voluminous
19 set of clients. The only way in which the government was
20 able to understand the nature and scope and the identities
21 of those clients was to use different investigative tools.
22 One of them was to use the undercover agent.

23 As set forth in the recordings that the undercover
24 agent made, Mr. Bandfield referred to other clients but
25 didn't name those other clients. He didn't hand our

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1 undercover agent, for example, a full client list. And it's
2 clear that some of the clients, for example, used email;
3 others did not. In fact, Mr. Bandfield cautioned our
4 undercover agent really to refrain from using email as much
5 as possible. There are certain kinds of information that
6 the government was only able to obtain, for example, through
7 wiretaps.

8 For example, the clients directing trading of
9 various stocks through their brokerage accounts, that, most
10 of the time happened, I would say the majority of the time
11 happened via the telephone. So there's whole kinds of
12 information that the government would -- did not have
13 wiretap capability, we would not have been able to obtain.

14 And we want to refute what Mr. Mulholland is
15 saying with respect to that our indictment would look
16 exactly the same. If you look at the indictment itself, for
17 example, there's a stock, Cana, C-a-n-a, in which we
18 actually set forth the trades that were directed by one of
19 the corrupt clients of that stock to manipulate that stock.
20 The way in which we were able to set forth that evidence was
21 through wiretaps.

22 And that's just one example, Your Honor, of the
23 way in which we intend to use the wiretap evidence at trial
24 and why it was very critical in this case. There's no
25 accusation here that all of these different investigative

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1 techniques were not made clear to the Court. We were very
2 clear of what had been successful, but why the wiretaps were
3 very critical in this case, and they absolutely were.

4 With respect to this inconsistency, I believe
5 there's no inconsistency, Your Honor, about the email search
6 warrants -- sorry, the search warrant for Mr. Bandfield's
7 computer. The agent did explain how the email search
8 warrants had been very helpful to help us identify some of
9 the clients that were involved in this case. But that
10 doesn't mean that the wiretap evidence was not incredibly
11 helpful and necessary to help us round out the full scope of
12 who those clients were.

13 And, additionally, with respect to, you know, the
14 fact that the undercover agent was actually in Belize and
15 was able to access all of these co-conspirators that were in
16 Belize. For example, Mr. Mulholland wasn't even in Belize
17 during the time period that the undercover agent was there.
18 What we were able to do was capture Mr. Mulholland calling
19 in to IPC and giving direction and talking with his
20 co-conspirators about, for example, acquiring IBCs. He used
21 an alias. We were able to capture his voice. So that's,
22 obviously, critical evidence that we wouldn't have had
23 without the wiretaps.

24 So for those reasons. There were no
25 misrepresentations, Your Honor. We were very clear about

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1 what the wiretaps meant for our investigation, what else we
2 had done to investigate the case. And so the idea that
3 there was no necessity here is just simply not true.

4 THE COURT: All right. I'll reserve on that.
5 I'll deal with that.

6 The next individual request is the government is
7 requested to provide 404(b) evidence 60 days before trial.

8 Do you want to respond to that?

9 MR. KASOURAS: If I can just say, the reason -- I
10 understand what the normal practice is in the courthouse,
11 Judge, and it really depends, my request does depend on what
12 the 404(b) evidence is. And I think what Your Honor's
13 response may be is that they just need to do what's right
14 here. All I'm saying is that since Mr. Mulholland is not in
15 the United States, if the 404(b) material here consists of,
16 you know, things that happened in other countries, that it
17 would be very difficult and time consuming for us to
18 investigate, that the sooner they give it to us the better,
19 because it's a lot harder for us to be able to deal with it
20 if that's the case.

21 MR. PAES: Your Honor, in response we, obviously,
22 mention that we would provide any 404(b) one month prior to
23 trial. I can tell the Court right now, as we stand here
24 today, it's not that we are sitting on any 404(b) material,
25 you know, that we are not providing to the defense. So we

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1 don't have any 404(b) material in our possession at this
2 time.

3 To the extent we get it and we can produce it, you
4 know, a little bit sooner, we'll be happy to do that, but we
5 also don't want to be precluded as we think the defense
6 motions are trying to do with having us provide this.
7 Setting kind of a deadline by which we're going to bind
8 with them and then say, well, you can't do it if you find it
9 after that fact.

10 THE COURT: All right. That motion is a motion
11 that I can't grant. I'm, obviously, not going to direct the
12 government to be tied to any specific date, even if I had
13 authority to do it. They'll provide the 404(b) fully in
14 enough time to permit the government to prepare its defense.
15 I can't imagine -- just my overall sense of this case, the
16 indictment, what 404(b) evidence is going to be available to
17 me in terms of bad acts under 404(b).

18 In any event, turn it over as soon as you get it.
19 There's no reason why you have to hold on to it. The notice
20 of expert testimony, I think the law requires that. So
21 Mr. -- that motion is a motion which is a motion that I
22 don't have to deal with. I'd better say it's denied for
23 reasons that I don't have to deal with it. The law requires
24 that you do it.

25 Permission to file additional motions in limine.

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1 Yes, you have permission to file a notice in limine.
2 Hopefully, you'll do it in enough time to permit the
3 government to respond to it.

4 MR. KASOURAS: We will try, Judge.
5 We have two other --

6 THE COURT: If there's nothing else, I think that
7 the only motion that I really have to deal with is the Rule
8 16 motion which is the only significant.

9 MR. KASOURAS: Judge, we have two motions that we
10 have not addressed.

11 THE COURT: Which ones?

12 MR. KASOURAS: Well, our motion with respect to
13 surplusage is a little bit different and I think that, if
14 anything, it just simply need to be clarified in the
15 indictment.

16 Our singular motion with respect to surplusage has
17 to do with the language in the indictment relating to FATCA.

18 THE COURT: Relating to what?

19 MR. KASOURAS: F-a-t-c-a. And it's in paragraph
20 14 of the superseding indictment. And essentially FATCA is
21 a federal law that was enacted in 2010 that the government
22 states that targeted tax noncompliance by U.S. taxpayers
23 with foreign financial accounts in offshore assets. We
24 don't quarrel with that, with that fact, because it was
25 enacted in 2010. But as we set forth in our motion, it

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1 actually came into effect on a rolling basis, and so our
2 simple point is the indictment gives the impression that
3 FATCA was enacted and in effect, and, therefore, there to be
4 violated throughout the entire period of the conspiracy
5 whereas that's just not the case.

6 So while we understand the reference to FATCA in
7 the indictment, we do believe that the way it is referred to
8 in the indictment is misleading. And we, we set forth on
9 page 44 of our motion, Judge, how it basically, on a rolling
10 basis, certain parts of it were expanded and came -- and
11 even though it was in effect in 2010, was not being enforced
12 in full form. And in many ways, ways that do effect the
13 charges in this case.

14 THE COURT: Let me see if I understand what it is
15 that you've said. You said that the paragraph 14 is
16 misleading in some respect.

17 MR. KASOURAS: It's misleading in that it states
18 that the FATCA was enacted in 2010 and, therefore, gives the
19 impression that it was in effect and being enforced in the
20 years thereafter, which include the entire period charged in
21 this conspiracy. In fact, even though it was enacted in
22 2010, it was not being enforced. And there were specific
23 memoranda by the government as to its non-enforcement.

24 So all I'm asking is that the government clarify
25 in the indictment that it was enacted in 2010, but was not

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1 in effect until I believe it's 2000 and -- starting in 2012
2 and then it was expanded in 2013.

3 THE COURT: Did the statute, when it was enacted,
4 explicitly provide, the legislation explicitly provide that
5 this statute, this law becomes effective on a particular
6 date?

7 MR. KASOURAS: It did, but then there was a
8 memorandum issued that it was not going to be enforced.

9 MR. PAES: Your Honor, may I respond?
10 If I may.

11 MR. KASOURAS: Sure.

12 MR. PAES: Your Honor, first of all, the paragraph
13 is accurate in what it states. Additionally, first of all,
14 it doesn't meet the standard for surplusage, but that's
15 besides the point. And just in terms of its accuracy, it is
16 accurate.

17 What Mr. Kasouras is alluding to is that because
18 it was a new statute, the government didn't start enforcing
19 it to give individuals, businesses time to get in compliance
20 with the statute. But, obviously, the law is on the books.

21 And, importantly, we charged conspiracy count over
22 here. And, clearly, what this whole operation was set up
23 for and which Mr. Bandfield also explains in the video
24 referencing, you know, at parts FATCA by him and his
25 co-conspirators is an attempt and kind of a scheme that's

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1 designed to evade FATCA now that it's on the books.

2 The fact that it was being enforced, if we had a
3 substantive tax fraud count, that -- it would -- may be
4 relevant at that point in time because then you're saying,
5 well, it wasn't being enforced so we had time to comply with
6 it. And you are charging him for the entire time period
7 with tax fraud violation.

8 The charges are conspiracy, which is an agreement
9 to violate a law, which is on the books and whether it's
10 enforced or not, that's still a crime.

11 THE COURT: That's a remarkable argument that
12 there's a statute that says that something is unlawful, but
13 because it's not being enforced, you can violate the statute
14 and do what is unlawful. I mean, if I understand what
15 you're saying, that's essentially what you're saying to me.

16 MR. KASOURAS: I'm saying it only because the
17 government issued a memorandum publicly stating that it
18 would not be enforced.

19 THE COURT: Is that a fact?

20 MR. PAES: Your Honor, the government has stated
21 at various times that this is now going to be in effect.
22 There were certain parts that went into effect in 2012, some
23 in 2013, and there may have even been a part that went into
24 effect in 2014.

25 MR. KASOURAS: Right.

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1 MR. PAES: Regarding, you know, individuals,
2 business, whether they were U.S. based or based outside the
3 United States.

4 The issue though for the indictment and what
5 Mr. Kasouras is asking is to strike something in the
6 indictment as surplusage is that, one, accurate; two,
7 doesn't effect the charge in any way because it's a
8 conspiracy count and the fact that they were not enforcing
9 it until later, is, you know, is not relevant with respect
10 to the conspiracy count. The law was on the books and the
11 government gave individuals and businesses time by which to
12 become compliant with the law. But it was still on the
13 books and enacted in 2010.

14 THE COURT: All right. Your motion is denied.
15 What else, Mr. Kasouras?

16 MR. KASOURAS: Judge, with respect to the
17 privilege issue, there were documents that were provided to
18 prior counsel and the government has set forth in their
19 motion --

20 THE COURT: Right.

21 MR. KASOURAS: -- how they discerned what was
22 privileged and what was not privileged. And here's our
23 problem. Contrary to or different from the normal procedure
24 of what we normally have where the government, for example,
25 will execute a search warrant, they'll come into possession

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1 of documents that may be privileged. And then what happens
2 is after the person is arrested, there's usually a
3 discussion between both sides as to what is privileged, what
4 is not privileged, with the defense being given an
5 opportunity prior to that decision being made to voice an
6 opinion as to whether certain documents are privileged. And
7 oftentimes the Court may look at things in camera to make a
8 determination.

9 What we had here was the cooperating witness in
10 this case, the main cooperating witness, was an attorney who
11 represented various entities in this case for which the
12 government concedes there was an attorney or could have been
13 an attorney/client privilege. This individual, after he
14 begins cooperating, and I would submit we'd all agree may
15 have an agenda, motivated in some ways, provides these
16 documents to the government. And then the government on
17 page 80 of their response indicates the four criteria that
18 they used in determining what was privileged and what was
19 not privileged. One of them would be that the document
20 contained communications between the cooperating witness and
21 an individual who was not the witness' client. That's fine.
22 But then we have the document contained communications
23 between the cooperating witness and a client, but the
24 presence of a third party on the communication broke the
25 privilege. It's things like this that concern us.

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1 And all we're asking for is for the government to
2 provide us with, with respect to the documents that they
3 decided are not privileged, what criteria is attached to
4 each one. My client will then be able to discern if they
5 were communications between him and the government. For
6 example, whether or not there was or was not a third party
7 present. And he'd be able to articulate a response or a
8 challenge to the conclusions by the government, which is
9 precipitated and fueled, in large part, by a lawyer who's
10 now a cooperating witness seeking to carry favor with the
11 government, a smart guy, by the way, who presumably knows
12 what the privilege is and knows how to pierce it.

13 So the only way that we can really decide whether
14 the government has made an accurate determination as to
15 whether these things are privileged is to know which of
16 these four criteria attached to them. My sense is that in
17 making its determination, the government certainly would
18 have made notations with respect to the documents which are
19 all Bates numbered as to why they're not privileged.

20 MS. KASULIS: Your Honor, there's not one document
21 that Mr. Kasouras has pointed to thus far where he says the
22 document was improperly provided to the prosecution. It
23 seems to make more sense here is that there are documents
24 that Mr. Kasouras disputes should have been in the hands of
25 the prosecution after the firewall process was undertaken.

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1 We can certainly address that with him. But to go through
2 every single document to have to show what basis or what
3 combination of bases the firewall team who undertook an
4 extensive review of these documents seems very inefficient
5 considering the amount of evidence and discovery in this
6 case.

7 We are happy to address any concerns that
8 Mr. Kasouras has about specific documents that went through
9 the firewall process were deemed not privileged and provided
10 to the prosecution. He's not done so up until this point,
11 and if he chooses to do that, we're happy to address his
12 concerns.

13 MR. KASOURAS: Judge, there are over a thousand
14 documents that I can tell you most of which look privileged.
15 If the -- if the reason they're not privileged is because
16 some third party was there, I can't look at the document and
17 discern that. If they have an index where they can tell
18 us --

19 THE COURT: Well, excuse me. You say most of
20 which look privileged.

21 MR. KASOURAS: Right.

22 THE COURT: Why don't you tell the government what
23 documents you believe you think are privileged. And let the
24 government respond to it.

25 MR. KASOURAS: Okay.

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1 THE COURT: Instead of simply assuming that what
2 the government did is improper, incomplete. Improper in the
3 sense that the firewall didn't -- when the firewall says
4 there was a third party present there and, therefore, it's
5 not privileged, you don't believe it.

6 MR. KASOURAS: I don't imply any impropriety by
7 the government. I'm saying the information came from a
8 cooperating witness given to the government. How are they
9 to discern whether he's telling the truth or not?

10 MS. KASULIS: Your Honor --

11 MR. KASOURAS: It's not the government that's
12 making the decision. They're making a decision and it's
13 novel because they're making it based on information from a
14 cooperating witness as opposed to just an independent
15 analysis as to whether it's privileged. That's all I'm
16 saying.

17 THE COURT: Why don't you point out to the
18 government what documents you think the government -- the
19 cooperating witness may be disseminating about.

20 MR. PAES: One other thing, Your Honor. I think
21 Mr. Kasouras may also want to consider in that analysis,
22 which might save him some time. Obviously, the crime fraud
23 exception has been implicated here by the fact that the
24 lawyer and the client have been charged in this case. So
25 that might actually help get us done faster.

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1 THE COURT: That's a rather interesting argument
2 you're making. The government should determine whether the
3 cooperator is telling the truth. I suppose if the
4 government has any suspicion that the cooperator is not
5 telling the truth, he wouldn't for very long have a
6 cooperation agreement. I think you've been through that on
7 more than one occasion.

8 Is there anything else? Nothing.

9 MR. INGOGLIA: No, Your Honor.

10 MS. KASULIS: No, Your Honor.

11 THE COURT: So all I really have is the Rule 16
12 issue, essentially. And as soon as the superseding
13 indictment is handed down, I'll have the parties come in and
14 see if we can fix a firm trial date. Get this case started
15 without undue delay, unnecessary delay.

16 And you'll have to be concerned about your own
17 trial schedule with respect to that, Mr. Kasouras.

18 All right. Anything else?

19 MS. KASULIS: No, Your Honor.

20 THE COURT: Thank you very much. It's been a
21 pleasure to have you all here.

22 MS. KASULIS: Thank you, Judge.

23 MR. INGOGLIA: Thank you.

24 THE COURT: There was something I was supposed to
25 ask you about, whether we need a hearing on the agency

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1 issue, right?

2 MR. PAES: Oh, yes.

3 THE COURT: I asked you to remind me.

4 MR. INGOGLIA: The question of the hearing.

5 THE COURT: We need a hearing on that agency

6 issue.

7 MR. INGOGLIA: That's right. And we didn't remind
8 you.

9 THE COURT: All right. Do you want that? Do you
10 think that's necessary?

11 MR. INGOGLIA: I think so, Judge.

12 THE COURT: Okay. That's fine if you think it is.
13 It's like in the nature of kind of a Fatico hearing. So why
14 don't we fix a date for that.

15 When can you have your witnesses available?

16 MS. KASULIS: Your Honor, if we could just have a
17 quick moment. We just want to talk about the nature of the
18 hearing. Excuse me.

19 THE COURT: Sure. Sure.

20 (Brief pause.)

21 COURTROOM DEPUTY: March 29th, that's Tuesday, at
22 10:00 a.m.

23 MR. PAES: Okay.

24 MR. INGOGLIA: Done.

25 MS. KASULIS: Okay.

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1 THE COURT: March 29th at what time?

2 COURTROOM DEPUTY: 10 o'clock.

3 MR. SAPONE: Did you say 10:00 a.m.?

4 COURTROOM DEPUTY: 10:00 a.m.

5 THE COURT: When we said that the only thing that
6 I think I have to deal with was the Rule 16, let me just
7 clarify something. I'm not sure -- I don't think you're
8 making a Franks' motion, Mr. Kasouras. Your contemplation
9 of a Franks' motion was based upon what you perceive to be
10 some inconsistency in two affidavits.

11 If my recollection of Franks v. Delaware is still
12 accurate, I think the question would be whether assuming
13 those two so-called inconsistencies or those two items were
14 not in the affidavit, would the affidavit still be enough to
15 justify the issuance of a warrant? Or would they be so
16 material that if they, in fact, were inconsistent the
17 magistrate wouldn't have issued the warrant. I would
18 suspect that even if there is some slight inconsistency, it
19 probably would not have effected the determination whether
20 there was enough probable cause to --

21 MR. KASOURAS: I don't make those motions lightly.
22 The reason that I put it in was under Rajamadari
23 (phonetic) --

24 THE COURT: It's part of your necessity argument.

25 MR. KASOURAS: Right.

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1 THE COURT: So I still remember Franks v.
2 Delaware, at least in part.

3 MR. KASOURAS: Judge, there's not a lot you don't
4 remember.

5 THE COURT: Is there anything else?

6 MR. INGOGLIA: No, Judge.

7 MS. KASULIS: Your Honor, obviously, the motions
8 are pending so time would be excluded.

9 THE COURT: Right. Right. That's correct.

10 MS. KASULIS: Until the hearing date?

11 THE COURT: Aside from which I think it's an
12 understatement to say this is a complex case, which is also
13 a basis for excluding time, but the fact that motions are
14 pending. Although, I think the Speedy Trial Act also in the
15 cases say that there was a period of time within which
16 motions can't be pending forever have to be disposed of at
17 some point.

18 In any event, thank you very much. Time is
19 excluded until March 29th and we'll deal with a further
20 exclusion then.

21 Thank you.

22 MS. KASULIS: Thank you, Judge.

23 MR. INGOGLIA: Thank you, Your Honor.
24
25